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No. 90-1124

In the Supreme Court of the United States

OCTOBER TERM, 1990

KEITH JACOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether government agents must reasonably suspect that a person has committed or is likely to commit criminal acts before the agents may conduct an undercover criminal investigation of the individual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1a-19a) is reported at 916 F.2d 467. The panel opinion of the court of appeals (Pet. App. 20a-29a) is reported at 893 F.2d 999.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 15, 1990. The petition for a writ of certiorari was filed on January 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of receiving through the mails sexually explicit material depicting a minor, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to two years' probation and 250 hours' community service. A panel of the court of appeals reversed his conviction, but on rehearing the en banc court of appeals affirmed.

1. In June 1987 petitioner received through the mail a magazine depicting young boys engaging in sexual activity. The distributor of the magazine turned out to be an undercover postal inspector, and petitioner was arrested following a controlled delivery of the magazine. Pet. App. 2a.

That delivery was the culmination of a lengthy investigation of petitioner that began in May 1984 when police searched a California pornographic bookstore and discovered petitioner's name on the store's mailing list. In February 1984 petitioner had ordered two magazines that contained photos of nude adolescent boys, as well as a brochure listing other stores that sold sexually explicit magazines. A postal inspector, posing as a member of a hedonist organization, then mailed petitioner a sexual attitude survey and a membership application. In February 1985, petitioner paid the fee to receive a quarterly newsletter from the organization. He also returned the survey, in which he expressed a preference for preteen sex. Pet. App. 2a; Pet. 5-6. In May 1986, Postal Inspector Calvin Comfort mailed petitioner another survey. Although petitioner did not complete the survey, he responded affirmatively, saying that he wished more information and that he was "interested in teenage sexuality." In response, Comfort sent petitioner a list of "pen pals" who supposedly had similar

sexual interests. In reality, each of the names on the list was a pseudonym for Comfort. Posing as "Carl Long," Comfort wrote petitioner in September 1986. Petitioner wrote "Long" twice, one time sending him a newspaper directed to homosexuals. Pet. App. 2a; Pet. 6-8.

In March 1987, a third postal inspector sent petitioner a letter ostensibly from a firm offering sexually explicit materials for sale. Petitioner ordered a catalog and subsequently ordered a magazine entitled, *Boys Who Love Boys*, described in the catalog as "eleven year old and fourteen year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." Petitioner received the magazine on June 16, 1987, via a controlled delivery. Pursuant to a warrant, postal inspectors then searched petitioner's home and found the magazine. Pet. App. 2a; Pet. 11-13.[1]

2. At trial, petitioner contended that he had been entrapped because there was no evidence that he was predisposed to commit the instant offense. On appeal, however, petitioner's primary argument was that because the government lacked reasonable suspicion to conduct an undercover investigation of him, the government's conduct was outrageous and should bar his conviction.[2] Petitioner prevailed on his claim before a divided panel of the court of appeals. The majority held that petitioner's 1984 order from the California bookstore was not evidence of predisposition and did not furnish reasonable suspicion that petitioner had committed a crime or was likely to do so. Pet. App. 22a-23a, 25a-26a. Judge Fagg dissented. He con-

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[1] At about the same time, petitioner ordered a set of sexually explicit photographs from a firm that was an undercover front for the Customs Service. Those photographs were never delivered. Pet. App. 2a; Pet. 12.

[2] Although petitioner did not make that claim at trial, the court of appeals entertained it on appeal.

cluded that reasonable suspicion is not a prerequisite to an undercover investigation, and that, in any event, the government had reasonable suspicion here. *Id.* at 26a-29a.

On rehearing en banc, the court of appeals adopted the views of Judge Fagg. The court observed that "[d]ue process limitations 'come into play only when the [g]overnment activity in question violates some protected right of the defendant.'" Pet. App. 3a (quoting *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (emphasis omitted)). Since, in the court's view, petitioner did not have a constitutional right to be free from investigation, the initiation of that investigation did not violate petitioner's due process rights. As to petitioner's argument that the government needed reasonable suspicion before investigating him, the court joined the other courts of appeals that have refused to impose such a requirement. Pet. App. 4a-5a. The court went on to find that the government's conduct in this case was not outrageous, because the government simply mailed surveys, letters, and catalogs to petitioner, and he voluntarily responded. In the words of the court, "[t]he postal inspectors did not apply extraordinary pressure on [petitioner]. The inspectors merely invited [petitioner] to purchase pornographic material through the mail." *Id.* at 5a. Petitioner could have ignored the contents of the mailings, the court said, so the supposed entreaties to him involved far less pressure than would have been involved in face-to-face contacts. *Id.* at 6a.[3]

Two judges dissented. Chief Judge Lay stated that petitioner was not predisposed to commit the charged offense, so in his view petitioner was entrapped as a matter of law. Pet. App. 7a-8a. Judge Heaney, the author of the panel

[3] The court likewise rejected petitioner's claim that he had been entrapped as a matter of law. The court found instead that there was sufficient evidence to warrant the jury's finding of predisposition. Pet. App. 6a-7a.

opinion, reiterated his views that the government's investigative conduct in this case was outrageous and that the government should be required to have reasonable suspicion of criminal activity before commencing an undercover criminal investigation. *Id.* at 8a-19a.

ARGUMENT

Petitioner renews his claim that because the government did not reasonably suspect him of criminal activity, the investigation of him was improper and should have been deemed "outrageous government conduct" so as to bar his conviction. Pet. 14-27. The contrary decision of the court of appeals is correct, however, and is in accord with the decisions of this Court and every other court of appeals that has confronted the issue. Consequently, further review is not warranted.

In *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), the Court introduced the notion of an outrageous government conduct defense and distinguished it from the entrapment defense. In dictum the Court noted that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," but the Court found that neither defense was satisfied in that case. Three years later, in *Hampton* v. *United States*, 425 U.S. 484, 489-490 (1976), a plurality of the Court expressed doubt that outrageous government conduct in the course of an investigation could ever provide a defense to a criminal defendant. Instead, any due process limitations come into play, the plurality concluded, only when governmental conduct violates a defendant's protected rights. *Id.* at 490. Two Justices concurred in the affirmance of Hampton's conviction, but expressed the view that an outrageous government

conduct defense might be open to a defendant in an exceptional case. *Id.* at 492-495 (Powell, J., concurring in the judgment).

In the wake of *Hampton*, the courts of appeals have held that a defendant may prevail on a claim of outrageous governmental conduct only by showing that the conduct was "truly outrageous." See, *e.g.*, *United States* v. *Miller*, 891 F.2d 1265, 1267 (7th Cir. 1989) (collecting cases); *United States* v. *Driscoll*, 852 F.2d 84, 86 (3d Cir. 1988). Offers of inducement have been held to be proper, because the Due Process Clause grants law enforcement agencies "wide leeway" in conducting their investigations of crime. *United States* v. *Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983).

No constitutionally protected right of petitioner was violated in this case. Petitioner had no right to possess child pornography, *Osborne* v. *Ohio*, 110 S. Ct. 1691 (1990), and he had no right to be free from investigation, *e.g.*, *United States* v. *Trayer*, 898 F.2d 805, 808 (D.C. Cir.), cert. denied, 111 S. Ct. 113 (1990). Hence, he can prevail only if he can show that the government's conduct in sending him a few letters, surveys, and catalogs was so outrageous as to offend the notion of due process. As the court of appeals aptly observed, Pet. App. 6a, those actions were far less pressing inducements than those that typically occur between two persons in face-to-face meetings. This very type of conduct was held not to be outrageous in *United States* v. *Driscoll*, 852 F.2d at 85-87.

The decision below also is in accord with the unanimous view of other circuits that the government need not have reasonable suspicion of criminal activity before beginning an undercover investigation of a particular individual. *United States* v. *Luttrell*, No. 87-5303 (9th Cir. Jan. 23, 1991) (en banc), slip op. 750-751; *United States* v. *Driscoll*, 852 F.2d at 86-87; *United States* v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099

(1985); *United States* v. *Gamble*, 737 F.2d 853, 860 (10th Cir. 1984); *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 956 (1980); see also *United States* v. *Thoma*, 726 F.2d 1191, 1198-1199 (7th Cir.), cert. denied, 467 U.S. 1228 (1984).[4] Those courts recognize that as long as the conduct of the investigation does not violate due process, the absence of reasonable suspicion at the outset of the investigation does not bar the conviction of someone who commits a crime. Since the investigation in this case did not violate petitioner's due process rights, he cannot escape liability on the ground that the postal inspectors might not have had reasonable suspicion of his criminal activity at the outset of their investigation.[5]

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[4] *United States* v. *Hunt*, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985), on which petitioner relies, Pet. 17, does not support his claim. In that case, the court of appeals said that, assuming that an outrageous conduct defense exists, the record showed that the conduct of the investigators "was hardly so 'outrageous[ ]' * * * as to preclude a conviction." 749 F.2d at 1087 (citation omitted). The court went on to note that information sent to the FBI created a reasonable basis for the investigation, but nowhere did the court suggest that such a basis was a prerequisite to a valid investigation.

[5] In the "questions presented" portion of his petition, petitioner lists several other issues that this case purportedly raises. He has not separately addressed any of those additional issues in the body of his petition, however, so we have not responded to them.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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